FEB 3 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

—against—

UNITED ARTISTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PAUL MARTINSON
Attorney for Respondent

PHILLIPS, NIZER, BENJAMIN,
KRIM, & BALLON

DAVID G. MILLER
477 Madison Avenue
New York, N. Y.
758-6700
Of Counsel

INDEX

PAGE

Question Presented 1

Statement of the Case 2

Reasons for Denial of the Writ 4

A. Here the grievance is based entirely upon respondent's alleged underpayment to petitioner of the Picture's fair share of the total television receipts (or its fair television value), in breach of the contract, and is not even indirectly based upon any antitrust violation 5

B. The decision below clearly follows the criteria of the decisions of this Court, and in no respect does it "conflict" with any of them 9

C. This Court has uniformly denied certiorari in antitrust "standing" and other cases, despite the existence of "conflicts" between Circuits similar to, more important, and more likely to recur, than the conflict asserted here 13

D. The decision below is manifestly correct, and is supported by consistent, overwhelming authority 19

Conclusion 20

PAGE

Table of Authorities

Cases:

Arlington v. Mayer, *cert. den.*, 339 U.S. 965 (1950) (no lower court opinion) 18

Beal v. United States, 182 F.2d 565 (6th Cir.), *cert. den.*, 340 U.S. 852 (1950) 18

Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2nd Cir. 1970) 4

Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2nd Cir. 1958) 19

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir.), *cert. den.*, 342 U.S. 919 (1952) ..10, 14, 15, 18

Coplon v. United States, 191 F.2d 749 (D.C. Cir.), *cert. den.*, 342 U.S. 926 (1952) 18

Delaware v. Curran, 259 F.2d 707 (3d Cir.), *cert. den.*, 358 U.S. 948 (1958) 18

Federal Trade Commission v. Sinclair Ref. Co., 261 U.S. 464 (1922) 11

Ferraiolo v. Newman, 259 F.2d 342 (6th Cir.), *cert. den.*, 359 U.S. 927 (1959) 18

Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929) 19

Harrison v. Paramount Pictures, Inc., 211 F.2d 405 (3rd Cir.), *cert. den.*, 348 U.S. 828 (1954) 14, 16

PAGE

Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) 16

Lieberthal v. North County Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y.), *aff'd*, 332 F.2d 269 (2nd Cir. 1964) .. 19
Loeb v. Eastman Kodak Co., 183 Fed. 704 (3rd Cir. 1910) 19

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 12
Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3rd Cir.), *cert. den.*, 352 U.S. 890 (1956) 14, 15, 16
Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass.), *aff'd* 242 F.2d 758 (1st Cir.), *cert. den.*, 355 U.S. 828 (1957) 19
Missouri Pac. R.R. v. H. Rouw Co., 258 F.2d 445 (5th Cir.), *cert. den.*, 358 U.S. 929 (1959) 18
Mulvey v. Samuel Goldwyn Productions, 5 Trade Reg. Ref. (1970 Trade Cas.), ¶73,361, 89,448 (9th Cir. October 20, 1970) 13, 14, 16

Nationwide Auto Appraiser Serv. Inc. v. Association of Casualty and Surety Companies, 382 F.2d 925 (10th Cir. 1967) 20
NLRB v. Sanson Hosiery Mills, 195 F.2d 350 (5th Cir. 1950), *cert. den.*, 344 U.S. 863 (1952) 18
NLRB v. Southern Bleachery & Print Works, Inc., 257 F.2d 235 (4th Cir.), *cert. den.*, 359 U.S. 911 (1959) 18

Perkins v. Standard Oil of Calif., 395 U.S. 642 (1969) ..12, 17
Perma Life Mufflers, Inc. v. International Parts, Inc., 392 U.S. 134 (1968) 12

PAGE

Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2nd Cir.), *cert. den.*, 350 U.S. 936 (1956) 16

Radovich v. National Football League, 352 U.S. 445 (1957) 12

Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970) 19

SCM Corporation v. Radio Corporation of America, 276 F. Supp. 373 (S.D.N.Y.), *aff'd*, 407 F.2d 166 (2nd Cir.), cert. den., 395 U.S. 943 (1969) 12, 13, 14, 16, 17

Seven-Up Co. v. Blue Note, Inc., 260 F.2d 584 (7th Cir.), *cert. den.*, 359 U.S. 966 (1959) 18

Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956) 15, 20

Sokol Bros. Furniture Co. v. Commissioner of Internal Revenue, 185 F.2d 677 (5th Cir.), *cert. den.*, 340 U.S. 952 (1951) 18

Tyrrell v. District of Columbia, 243 U.S. 1 (1916) 7

Volasco Products Co. v. Lloyd A. Frey Roofing Co., 308 F.2d 383 (6th Cir.), *cert. den.*, 372 U.S. 907 (1963) 16

VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969) 19

United States v. Abrams, 197 F.2d 803 (6th Cir.), *cert. den.*, 344 U.S. 855 (1952) 18

United States v. Community Services, Inc., 189 F.2d 421 (4th Cir.), *cert. den.*, 342 U.S. 932 (1952) 18

PAGE

United States v. Loew's, Inc., 371 U.S. 38 (1962) 9, 10, 11, 14

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 5, 9, 11

Zipp v. Commissioner, 259 F.2d 119 (6th Cir.), *cert. den.*, 359 U.S. 934 (1959) 18

Other Authority:

Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws*, 72 Harv. L. Rev. 50 (1958) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1062

FIELDS PRODUCTIONS, INC.,

Petitioner,

—against—

UNITED ARTISTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, United Artists Corporation, respectfully submits this brief in opposition to the petition of Fields Productions, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment entered September 8, 1970, unanimously affirming two District Court decisions dismissing the petitioner's complaint.

Question Presented

The only question actually presented is as follows:

Petitioner was the producer of a single motion picture, is not and never has been engaged in either the business of film distribution or the ownership or operation of a

television station, and voluntarily granted to respondent the exclusive license to distribute said picture, retaining only a percentage interest in the receipts therefrom. May said petitioner maintain an antitrust treble damage action against the distributor, alleging the distributor's block booking of said film to its own television station customers, but claiming damages attributable to the distributor's alleged breach of its license agreement with petitioner, and not to the alleged block booking?

Statement of the Case

The relevant facts are not in dispute. Petitioner ("Fields") is a corporation engaged exclusively in the business of producing motion pictures—a total of three during its entire existence—and in no sense a customer or competitor of respondent distributor ("United Artists"). In 1956, Fields entered into a written agreement with United Artists, giving it the exclusive right to distribute, both theatrically and on television, a motion picture produced by Fields entitled "Happy Anniversary" ("the Picture") (App., 31-33).*

Pursuant to said agreement, Fields was to receive a percentage of the revenue realized from United Artists' distribution of the Picture. United Artists agreed to use its best efforts in such distribution (*id.* at 33 *et seq.*). The Picture was distributed exclusively by United Artists until December 1966, when United Artists' distribution rights expired. No claim has been made with respect to United Artists' distribution of the Picture in theatres. Fields'

* Appendix references, unless otherwise noted, are to the Appendix in the Court of Appeals.

percentage interest (virtually a royalty) in said potential television distribution receipts, represents therefore, the entire subject matter of its claim.

In approximately January 1964, United Artists began to enter into licensing agreements with various television stations for showing the Picture in that medium. During the brief period before United Artists' exclusive distribution rights expired (Fields having refused to extend said rights), the Picture received in excess of $213,000 as its share of the proceeds realized from television distribution (App., 28).

Fields complains that United Artists, in its television distribution of the Picture, engaged in the practice of "block booking" by "condition[ing] the license of the Picture [to television stations] upon the acceptance by each station of a package or block of one or more of 39 other pictures . . ." (App. 7; sought, in the "proposed supplemental complaint" at 72, to be increased in number). It is further alleged that United Artists realized from the distribution to television stations of the Picture together with the films with which the Picture was allegedly block booked, *in toto*, the sum of $4,616,432 (App., 8) or, as "supplemented," $7,741,000 (App., 75-76).

Fields brought this action contending that by reason of such block booking it has been deprived of "a substantial portion of the economic value of the Picture" (App., 12, 79). It claims that United Artists "arbitrarily allocated" to the Picture a sum which was $400,000 less than it should have been (App., 9).

United Artists moved to dismiss the complaint herein, and District Judge McLean granted that motion on two grounds: (1) that Fields lacked standing to sue because

he was not within the "target area" of the block booking proscription, under established law, and (2) that the injury claimed by Fields was not caused by the alleged block booking—even "incidentally"—but by United Artists' allegedly improper allocation of its television receipts, or breach of its contract with Fields (App. 1-3 of Petition). The Court of Appeals unanimously affirmed the District Court's judgment on the opinion below (Petition App. 6), citing, as additional authority, its most recent decision of *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2nd Cir. 1970).

Even before the respondent moved to dismiss the complaint, petitioner impliedly recognized the weakness of its complaint. Thus, as stated in the petition (p. 4, ftn.) it voluntarily withdrew "Count II" of the complaint (which was based solely and frankly on the breach of contract)—because it feared that its antitrust count would be dismissed and knew that there was no independent jurisdiction of the contract count. Indeed, previously thereto, Fields instituted a separate action in the New York Supreme Court for said breach of contract; its complaint (like its former "Count II") alleges the same acts as are here alleged, but without seeking treble damages. That action represents, as the courts below held, Fields' actual and sole grievance.

Reasons for Denial of the Writ

Of all of the numerous antitrust complaints which have been dismissed for lack of standing to sue, and in which petitions for certiorari were filed alleging conflicts between Circuits—all of which were denied—the instant complaint

is legally the least tenable and the instant petition the least meritorious.

A. Here the grievance is based entirely upon respondent's alleged underpayment to petitioner of the Picture's fair share of the total television receipts (or its fair television value), in breach of the contract, and is not even indirectly based upon any antitrust violation.

As the District Court cogently held:

> "Moreover, in this case it is difficult to see how the block-booking could have caused injury to plaintiff, incidental or not. Plaintiff's grievance seems to be that it was not allocated a fair share of the total receipts from the block. The cause of plaintiff's damage, therefore, was the improper allocation, not the block booking. This may be a breach of contract, but it is not a violation of the antitrust laws. Plaintiff is already suing defendant for breach of contract, initially in this court and now in the state court. That would seem to be plaintiff's proper remedy. I can see no justification for trebling any damages to which plaintiff may be entitled." (Petition, App. 3; see also App. 4.)

Block booking and under-allocation or underpayment are clearly distinct and different from one another—in time, nature and concept. Even if both existed, the damages for the contractual underpayment cannot be trebled because of the block booking.

It is elementary that "block booking" means, simply, the conditioning of the licensing of one film upon the licensee's acceptance of another or other films, not merely the licensing of pictures "in blocks or groups" (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159—1948), which

is virtually always done in television (see Petition, p. 19). As will be shown, the coercion or impact of such conditioning is upon the television stations (the licensees), or upon competing distributors who are thereby excluded from the television market—certainly not upon the producer, who shares in any revenues derived from such block booking. Manifestly, the same under-allocation as is here charged could have been effected without any conditioning or coercion against the television stations. In that event Fields would have precisely the same grievance as he now asserts for breach of contract for the deficit.

Conversely, if United Artists had block booked, but had credited Fields' picture with its full alleged fair value—which is in no way inconsistent—Fields would have no grievance at all. Thus, if Fields had been paid a sufficient portion of the $4,616,432 admittedly received for the entire package of forty films of which its Picture was a part, it would have no grievance even though the Picture had been blocked booked to United Artists' customers. Fields' own grossly exaggerated estimate values the television rights in the Picture at $400,000 more than actually allocated (App., 9).* But this claimed damage, it is clear, must be sought by way of the pending contract action, and not an antitrust suit.** Fields suffered no injury as far as the antitrust laws are concerned.

---

* During its deposition plaintiff's president conceded that this $400,000 figure was "my opinion." When asked for the basis of this "opinion", he replied: "None whatsoever. It is my opinion." (App., 29).

** As Professor George Stigler, in an economic analysis appearing in 1963 Supreme Court Review at page 152, demonstrates, the effect of block booking is "to extract larger sums than otherwise would be possible from television stations." Hence, any damage to Fields, which received a percentage of such sums, could have been caused only by the misallocation of those "larger sums."

To said $400,000, the "proposed supplemental amended complaint" adds $250,000 for United Artists' alleged failure to "offer the Picture for a simultaneous network television exhibition" (as distinguished from its syndication among individual stations) (App., 73). This charge clearly has no relation whatsoever to any alleged "block booking" with other pictures.

In this case, therefore, the grounds of dismissal for lack of standing transcend those which have consistently been applied by the Courts (*infra*, C. and D.). They are not predicated merely upon the existence of an intermediate or other person who is directly damaged—or, *a fortiori*, upon differences in the "level" of distribution. Fields has completely misstated the nature of its cause of action, in an unwarranted attempt to treble its alleged damages. Indeed, the contractual nature of Fields' grievance is substantiated by the very language of its complaint (*e.g.*, pars. 5, 6, 7, 12, 13, 22; App., 5-9, 12)—on which Fields has artificially superimposed its claim for treble damages under the statute. These allegations relate primarily to United Artists' obligations under the contract, and to the manner and the alleged purpose of its allocation of the Picture's television receipts.

Fields' afterthought that, in addition to the alleged misallocation of receipts, Fields was precluded from certain television markets, is baseless and irrelevant, for at least four reasons:

(1) It is wholly outside the record, and cannot even be considered. See, e.g., *Tyrrell* v. *District of Columbia*, 243 U.S. 1 (1916). The complaint predicates Fields' damages *solely* upon the alleged improper or "arbitrary allocation" and block booking to the "ninety-six tele-

vision stations" to which the Picture *was* licensed (App. 9, 11); even when Fields constructed a "Proposed Supplemental Amended Complaint," for the purpose of distinguishing or circumventing the District Court's opinion, it did not (and logically could not) allege any preclusion from any stations by reason of the block booking. Indeed, it complained that "defendant entered into distribution contracts with *not less than 96* television stations located in over 30 different States," and that defendant block booked to those stations. (Emphasis added.)

(2) Even if Fields' flimsy rationalization had been pleaded, it postulates, essentially, only another consequence of the breach of the same provision of the distribution contract, which requires the distributor to use its best efforts to produce revenue, rather than an antitrust violation directed against the producer.

(3) It is innately preposterous—and contrary to the entire tenor of the complaint—that United Artists would thus have deprived itself of revenues. Fields, when it drew its complaint, was well aware that the other stations were simply not available for the picture, either because they were in competition with the 96 stations to which it was sold or for other reasons—so that Fields never, prior to its appeal, had the temerity to make such a contention.

(4) The contention is squarely contradicted by the petitioner's other argument (p. 19) that television stations require large quantities of motion pictures as "fungible programming material" and "could not care less" from whom they buy this material, in order to get the better picture. Concededly, therefore, the stations were not deterred by the tying in of the rest of the package, and there thus could have been no exclusion of Fields' picture from the television market as a result thereof.

Indeed, this last quoted assertion stultifies Fields' entire claim of block booking. If, as Fields contends, the television stations needed and were willing to accept said "programming material," they obviously were not coerced into buying it and, therefore (under *United States* v. *Paramount Pictures, Inc., supra,* at 159), there was no such forcing or conditioning as is requisite to block booking.*

B. The decision below clearly follows the criteria of the decisions of this Court, and in no respect does it "conflict" with any of them.

As the petition (p. 3) acknowledges, the prohibition of block booking of motion pictures to television stations by "conditioning" their sale upon the purchase of other pictures was enunciated and defined by this Court in *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962). In defining the purpose and scope of that prohibition, the Court clearly set forth the "two reasons" why block booking is violative of the antitrust laws:

> "[Tying arrangements] are an object of antitrust concern for two reasons—*they may force buyers into giving up the purchase of substitutes for the tied product,* see Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 97 L.ed. 1277, 1288, 73 S. Ct. 872, *and they may destroy the free access of competing suppliers of the tied product to the consuming market,* see International Salt Co. v. United States, 331 U.S. 392, 396, 92 L.ed. 20, 26, 68 S. Ct. 12. A tie-in contract may have one or both of these undesirable

* The speciousness of this entire action is further confirmed by Fields' admission, on its deposition herein (App. 28) that it had "no information" that block booking took place other than the fact that defendant sold pictures "in groups"—which, as above indicated, is entirely proper.

> effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item." (Emphasis added) (371 U.S. at 44-45).

Thus, as District Judge McLean held (Petition App. 2), in block booking for television there are two classes of persons within the "target area": (1) the television stations which, in the language of the *Loew's* decision, are forced to give up the freedom to purchase other films, and (2) the competing suppliers of the tied product, *i.e.*, other distributors of pictures to television stations, who are denied a market because the buyer has been forced to take said tied product from another seller. Clearly then, only the television stations and competing distributors of pictures for television can be directly affected by a distributor's tie-in sales, and have the "legitimate interests" that the Courts have sought to protect in the tie-in cases. See also Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws*, 72 Harv. L. Rev. 50, 60 (1958).

Fields, concededly, falls within neither of these categories.

Furthermore, Fields expressly surrendered the exclusive right to distribute its Picture to United Artists and retained nothing more than a contractual share in the proceeds derived from the distribution of the Picture. There can be no doubt, therefore, that Fields is in no position to claim antitrust injury, and is patently seeking "the windfall of treble damages." *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir.), *cert. den.*, 342 U.S. 919 (1952).

In addition, it was held in *United States* v. *Loew's, Inc., supra*, p. 9, that the evil sought to be proscribed is a restraint of "free competition in the market for the tied product" (p. 45). Obviously, Fields was not in the market for said "tied product"—*i.e.*, the pictures which he claims (equivocally, as aforesaid) that the television stations were forced to buy—nor did he compete with them, since he was not a distributor of other films which might have been licensed in lieu thereof. Petitioner's statement (p. 3) that in *Loew's* this Court "recognized that one of the anti-competitive effects of block booking was to restrict the sale * * * of better films" is a figment of petitioner's imagination.

In *United States* v. *Paramount Pictures, Inc., supra*, from which the petitioner (pp. 13-14) quotes out of context, this Court stated (at 157), "that block booking 'adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken' therewith." Clearly, the injury contemplated is that to the coerced purchaser of the tied picture, and not to the owner of the tying film, whose monopoly has been "add[ed] to."

In the language of this Court in another case: "the suggestion that the assailed practice [a tying arrangement] is unfair because of its affect upon the sale of [tying products] by their makers is sterile and requires no serious discussion." *Federal Trade Commission* v. *Sinclair Ref. Co.*, 261 U.S. 464 (1922). This implied limitation of the block booking cases is strongly fortified in the instant case, where, as above demonstrated, any injury allegedly suffered could have resulted only from a breach of contract, and not from the block booking at all.

The very decisions cited by the petitioner confirm the bankruptcy of its argument. Thus, the only conceivable relevance of *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (Petition, pp. 14, 16) is in its enunciation of the unquestioned proposition that a seller, as well as a purchaser, can sue for an antitrust violation which was directed against him. In *Radovich* v. *National Football League*, 352 U.S. 445 (1957), the plaintiff, a professional football player, allegedly blacklisted by defendants so as to prevent his employment in organized professional football, was obviously the direct target of the antitrust violations charged.

Perma Life Mufflers, Inc. v. *International Parts, Inc.*, 392 U.S. 134 (1968) (Petition, pp. 16-17), relating to the effectiveness of a defense of *pari delicto*, has not the slightest relevance to the questions of target area and causation here involved. As the Court of Appeals, Second Circuit, held in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 171 (2nd Cir.), *cert. den.*, 395 U.S. 943 (1969), even the language torn out of context by the petitioner (at p. 17) does not bestow the right to bring a "private action" upon persons not directly injured by reason of an antitrust violation (or *a fortiori*, as in the instant case, persons actually injured, if at all, only by other causes). *Perkins* v. *Standard Oil of Calif.*, 395 U.S. 642, 648-649) (1969) affirms the requirement of direct, rather than incidental, injury. The facts in this and petitioner's other Supreme Court authorities have no resemblance whatever to the instant facts, since in all of them plaintiff was clearly the person directly affected by the antitrust violation and his damages were not attributable to any common law breach.

C. This Court has uniformly denied certiorari in antitrust "standing" and other cases, despite the existence of "conflicts" between Circuits similar to, more important, and more likely to recur, than the conflict asserted here.

As regards the asserted conflict between the decision herein and a decision of the Court of Appeals for the Ninth Circuit in *Mulvey* v. *Samuel Goldwyn Productions*, 5 Trade Reg. Rep. (1970 Trade Cas.), ¶73,361 at 89,448 (9th Cir. October 20, 1970)—not only are the decisions distinguishable, but the conflict is not of such general importance as to warrant review by this Court.

First, *Mulvey* involved a direct sale of five pictures by plaintiff to defendant, with the sale price to be affected by the receipts realized from the subsequent distribution by defendant of the films. In the instant case, involving a licensing agreement providing for the payment of a percentage of the receipts to the producer, plaintiff was in the identical position of a patent owner who licenses his patent for royalties. Such a licensor has—as has been recently reiterated—no standing to sue for antitrust violations by his licensee affecting that licensee's customers and competitors. *SCM Corporation* v. *Radio Corporation of America*, 276 F. Supp. 373 (S.D.N.Y.), *aff'd*, 407 F.2d 166 (2nd Cir.), *cert. den.*, 395 U.S. 943 (1969).

Secondly, the court in *Mulvey* acknowledged that if there had been a contract and the damages had been caused by a breach of that contract "other than that constituting the antitrust violation," there would be no antitrust cause of action, 5 Trade Reg. Rep. (1970 Trade Cas.), at p. 89,449-50. That, as shown in Point A above, is precisely the case here.

Any conflict between these decisions clearly lacks the importance or dimensions which have uniformly been re-

quired for review by this Court. The two Circuit Courts did not differ in their views of the applicable antitrust principles of law, since the Ninth Circuit recognized both the target area and direct causation requirements. See also, *Conference of Studio Unions* v. *Loew's*, *supra*, p. 10. All that is actually involved here is the inference to be drawn from particular facts.

Furthermore, the conflict can affect few others than the litigants herein. *Fields* and *Mulvey* are the only decisions in private actions for television block booking since *United States* v. *Loew's*, *supra*, p. 9, in 1962. And, despite the continuous supervision of the Department of Justice, there has not been a single complaint by the Government based on such block booking. It is scarcely of national importance whether the courts below were correct in holding that this particular plaintiff, in an effort to treble his claim for damages, is "attempting to transform a claim for breach of contract into a treble damage antitrust action" (Petition, App. 4).

Moreover, the decision here sought to be reviewed follows an unusually long, cogent line of authorities in many Circuits, which deny standing to sue under similar circumstances—none, indeed, as convincing as the instant ones. In the majority of those cases, the plaintiff petitioned for certiorari and alleged similar conflicts with decisions in the Ninth as well as other Circuits, and these petitions were without exception denied.

For example, in *Harrison* v. *Paramount Pictures, Inc.*, 211 F.2d 405 (3rd Cir.), *cert. den.*, 348 U.S. 828 (1954) and *Melrose Realty Co.* v. *Loew's, Inc.*, 234 F.2d 518 (3rd Cir.), *cert. den.*, 352 U.S. 890 (1956), plaintiff, the owner of a motion picture theatre, charged its lessee, the oper-

ator of the theatre, with wilfully conspiring with motion picture distributors and competing theatres to split runs of motion pictures, to plaintiff's damage. These violations of the same statute as is here involved allegedly caused a decrease in the attendance in the theatre, thereby diminishing the percentage rentals paid to plaintiff under its lease, as well as an impairment in the value of the theatre. In both cases, judgment was granted in favor of the defendants on motion and affirmed by the Court of Appeals, on the ground that the plaintiff:

> " * * * is nonetheless not a 'person * * * injured in his business or property' within the meaning of section 4 of the Clayton Act, 15 U.S.C.A. §15, and, therefore, is not entitled to bring suit under the Act for an alleged conspiracy relating to the licensing of pictures at the theatre by the lessee-operator. * * * " (234 F. 2d at 519).

These decisions apply *a fortiori*, since there the plaintiff was the intended, and the *only*, victim who could claim any damage—the theatre operator having itself willingly participated and conspired in the antitrust violation. In the instant case, the persons directly affected by the alleged block booking, namely, the television stations and distributors of competing pictures, can sue therefor. Certainly—as observed by the Ninth Circuit Court of Appeals itself—it was not the intention of Congress to make "damages under the anti-trust law * * * available to those * * * who seek the windfall of treble damages because of incidental harm." *Conference of Studio Unions* v. *Loew's, Inc.*, *supra*, p. 10, at 54-55. Otherwise, "business men would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies." *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956).

If the decision herein were reversed, motion picture distributors would be subjected to a multiplicity of antitrust actions by any of the numerous persons who have percentage or other interests in the proceeds of most films (such as directors, actors and writers), seeking to treble the damages resulting from conduct fully reparable by non-statutory actions. Antitrust enforcement would be not fostered, but frustrated, through such a disregard of national guide-lines, and the normal conduct of competitive business would be hampered by trumped-up litigation.

In both the *Harrison* and *Melrose* cases, the plaintiff petitioned for certiorari, alleging "irreconcilable conflicts" in other circuits, including in *Melrose*, a contemporary decision in the Ninth Circuit. In both cases certiorari was denied.

In *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2nd Cir.), *cert. den.*, 350 U.S. 936 (1956), a patentee was held to have "no standing under the antitrust laws to complain of the incidental loss of royalties" resulting from violations directed against its licensees' business (p. 680). Plaintiff petitioned for certiorari, asserting a direct conflict with the Ninth Circuit decision in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955)—the principal authority cited in *Melvey*, and also heavily relied upon in the instant petition. This conflict was as sharp and direct as, and more important than, the conflict asserted here, but certiorari was denied.

In *Volasco Products Co.* v. *Lloyd A. Frey Roofing Co.*, 308 F.2d 383, 395, *cert. den.* 372 U.S. 907 (1963), the Court of Appeals for the Sixth Circuit held that " . . . a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer [citing

numerous cases throughout the Circuits]." Plaintiff's petition for certiorari alleged a conflict between the Sixth Circuit and the decisions of this Court as well as the Tenth Circuit, but this Court, consistently with its practice in similar cases, denied the petition.

Only about a year ago, this Court denied certiorari in the strikingly pertinent case of *SCM Corporation* v. *Radio Corporation of America*, 407 F.2d 166 (2nd Cir.), *affirming* 276 F.Supp. 373 (S.D.N.Y.), *cert. den.*, 395 U.S. 943 (1969). There, Radio Corporation (RCA) alleged that its licensee, SCM, had violated the antitrust laws through unlawful monopolization, restrictions in the licensing of plaintiff's machines, and "*illegal 'tie-in' provisions* in such licenses," thus causing "direct injury" to RCA (276 F.Supp. at 375-76) (emphasis added). RCA's claim was dismissed for legal insufficiency on the same two grounds as in the instant case: that RCA was not within the " 'target area'," and that the injury to it was not "direct" but "incidental" (276 F.Supp. at 376; 407 F.2d at 169).

This decision again applies *a fortiori*, for two reasons: (1) whereas in *SCM* the District Judge held that the injury was "incidental" rather than "direct" (276 F.Supp. at 376), in the instant case the same District Judge (McLean), after citing *SCM*, indicated that here the "block booking could [not] have caused injury to plaintiff, incidental or not"; and (2) SCM's alleged antitrust violations, "by eliminating the licensees," put SCM "in a position vis-à-vis RCA where it [could] make its own demands with respect to the use of the patents" (407 F.2d at 172)—a direct consequence having no analogue in the instant case. Accordingly, there was a dissenting opinion in *SCM*, the rationale of which would not apply to the instant case, and the decision here was unanimous.

In its petition for certiorari, and subsequently in its petition for a rehearing of this Court's denial of certiorari, RCA cited, as "conflicting," most of the decisions cited in the instant petition (up through *Perkins* v. *Standard Oil Co.*, *supra*, p. 12), but both petitions were denied. There is no reason why this Court should now, one year later, take a contrary view of a decision which is even less questionable, in a matter less important and less recurrent than the one cited.

In *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d at 54-55, which also limited antitrust recovery "to those who have been directly injured by the lessening of competition," certiorari was also denied, 342 U.S. 919 (1952).

In addition, this Court has repeatedly denied petitions for certiorari in other types of cases, involving direct and more significant and pervasive conflicts than the one here postulated. See for example, *United States* v. *Abrams*, 197 F.2d 803 (6th Cir.), *cert. den.*, 344 U.S. 855 (1952); *United States* v. *Community Services, Inc.*, 189 F.2d 421 (4th Cir.), *cert. den.*, 342 U.S. 932 (1952); *Sokol Bros. Furniture Co.* v. *Commissioner of Internal Revenue*, 185 F.2d 677 (5th Cir.), *cert. den.*, 340 U.S. 952 (1951); *Beal* v. *United States*, 182 F.2d 565 (6th Cir.), *cert. den.*, 340 U.S. 852 (1950); *Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir.), *cert. den.*, 342 U.S. 926 (1952); *Arlington* v. *Mayer*, *cert. den.*, 339 U.S. 965 (1950) (no lower court opinion); *NLRB* v. *Sanson Hosiery Mills*, 195 F.2d 350 (5th Cir.), *cert. den.* 344 U.S. 863 (1952); *Zipp* v. *Commissioner*, 259 F.2d 119 (6th Cir.), *cert. den.*, 359 U.S. 934 (1959); *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (4th Cir.), *cert. den.*, 359 U.S. 911 (1959); *Seven-Up Co.* v. *Blue Note, Inc.*, 260 F.2d 584 (7th Cir.), *cert. den.*, 359 U.S. 966 (1959); *Missouri Pac. R.R.* v. *H. Roux Co.*, 258 F.2d 445

(5th Cir.), *cert. den.*, 358 U.S. 929 (1959); *Delaware* v. *Curran*, 239 F.2d 707 (3d Cir.), *cert. den.*, 358 U.S. 948 (1958) and *Ferraiolo* v. *Newman*, 259 F.2d 342 (6th Cir.), *cert. den.*, 359 U.S. 927 (1959).

Moreover, none of the cases last cited was supported by a line of authorities even approaching, in uniformity and cogency, the authorities supporting the decision below, in which certiorari was so consistently denied. In the light of those details, the conflict here asserted is, surely, insignificant and insubstantial.

D. The decision below is manifestly correct, and is supported by consistent, overwhelming authority.

The numerous decisions throughout the Circuits which led inevitably to the decision here, and in which petitions for certiorari were uniformly denied, are set forth in Point C above. Point B demonstrates that the decision also follows from the decisions and reasoning of this Court, and Point A shows that this constitutes the strongest case for dismissal of all.

There are numerous other decisions which support the instant one, among which are the following:

> *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970); *Lieberthal* v. *North County Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y.) *aff'd*, 332 F.2d 269 (2nd Cir. 1964); *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F.2d 292 (2nd Cir. 1958), (L. Hand, C.J.); *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (3rd Cir. 1910); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd* 242 F.2d 758 (1st Cir.) *cert. den.* 355 U.S. 828 (1957); *VTR, Inc.* v. *Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969); *Gerli* v. *Silk Ass'n of America*, 36 F.2d 959 (S.D.N.Y. 1929) (Thacher, D.J.).

Thus also, *Nationwide Auto Appraiser Serv., Inc.* v. *Association of Casualty and Surety Companies*, 382 F.2d 925, 929 (10th Cir. 1967), pointed out that "the directness rule" has been applied consistently since the enactment of the Clayton Act, and that:

> "If the times have changed, and the needs of business have changed to bring about a need to extend the right of recovery to others, Congress would have so indicated."

The language of Judge Wyzanski in *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956) is even more pointed:

> "It [Congress] seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery." (at 909).

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted.

PAUL MARTINSON
Attorney for Respondent

PHILLIPS, NIZER, BENJAMIN,
KRIM, & BALLON

DAVID G. MILLER
477 Madison Avenue
New York, N. Y.
Of Counsel